31 October 2024

Courts System Policy
Ministry of Justice

By email: courtspolicy@justice.govt.nz

Tēnā koe

Improving jury trial timeliness: discussion document

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the discussion document: *Improving Jury Trial Timeliness* (**discussion document**), which proposes:

   (a) increasing the threshold for electing a jury trial, from the present threshold of an offence punishable by a sentence of imprisonment of two or more years; and

   (b) enabling flexibility in the timing of a jury trial election, potentially delaying the requirement to elect to a later stage in proceedings.

2. The Law Society's feedback has been prepared with the assistance of the Law Society's Criminal Law and Human Rights and Privacy Committees.[1] It is structured as follows:

   (a) General comment.

   (b) The proposal to raise the threshold of eligibility to elect a jury trial. The Law Society does not support this proposal. This section:

      i. Summarises the purposes in providing for the right to a jury trial (concurring with analysis in the discussion paper).

      ii. Sets out concerns that the Law Society has about the proposal, including gaps in the information and analysis provided to justify the proposal; and that, given the important purposes of providing for a right to elect a jury trial beyond a certain threshold of seriousness, this right should not be eroded for reasons of efficiency or administrative convenience.

      iii. Concludes that change to the penalty threshold at which an election can be made is not adequately justified in the discussion document and (if it is amended regardless) it should certainly not be higher than three years.

      iv. Considers the further question regarding rewording of section 24(e) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**), which protects the right to elect a jury trial.

   (c) The proposal to delay the timing of a jury trial election. The Law Society supports this proposal.

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1 For more information on the Law Society's sections and committees, please visit our website: www.lawsociety.org.nz/branches-sections-and-groups/.

(d) Other solutions.

1 General comment

3. This submission begins from the premise that a defendant's fair trial rights are paramount.[2] That proposition reflects a fundamental tenet of our criminal justice system and should not be undermined.

4. The Law Society acknowledges the importance of improving timeliness in the courts. The timeliness of court proceedings is one important factor in maintaining confidence in the criminal justice system. If court processes are delayed, other rights in the Bill of Rights, including the right to be tried without undue delay, may be impaired.[3]

5. A defendant can receive a fair trial by judge alone in many cases. Not every matter requires a jury trial. However, the importance of the right to elect to be tried by a jury of one's peers (beyond a certain threshold of offence seriousness), is reinforced by its inclusion in section 24(e) of the Bill of Rights. Section 24(e) provides that (except in the case of an offence under military law) a defendant "shall have the right … to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more".[4] The threshold was changed by section 4 of the New Zealand Bill of Rights Amendment Act 2011 to two years (having formerly been three months).

6. The description of juries as "the conscience of the community" highlights the importance of and role played by juries in the criminal justice process.[5] As the discussion document rightly notes, juries assist in delivering the right to "a fair and public hearing by an independent and impartial court".[6] They give legitimacy to the criminal justice process. They have an educative function, bringing the community into the courtroom.

7. The concept of a 'jury' is also not historically immutable. It has evolved over time. It is valid to at least consider whether the current expression of the right to trial by jury remains fit for purpose.

8. In 2010, when this issue was previously considered, the Law Society did not support a proposal to restrict the election of a jury trial to offences that carry a term of imprisonment of three years or more and argued that the threshold should not be changed. The Law Society's previous feedback on the issue bears repeating:

> The restriction of jury trials to offences that carry a term of imprisonment of 3 years or more is a significant change to the fundamental right to be tried by a jury or one's peers. This fundamental right is a cornerstone of the common law within the New Zealand system of criminal justice, and the apparent savings might be more illusory than real. A less serious offence that goes to a jury trial under the current system would still be a short trial whether it was dealt with by a Judge alone, or by a jury. The actual savings in time and money may not warrant such an intrusion into the fundamental right to be tried by a jury currently enjoyed by every New Zealander accused of an offence punishable by more than three months imprisonment. Even though we do not agree with any change to the right to elect jury trial, perhaps it would be better to restrict jury trial to offences that carry a term of imprisonment of two years and more.

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2 *Howse v R* [2005] UKPC 30.

3 New Zealand Bill of Rights Act 1990, s 25(b).

4 See further Criminal Procedure Act 2011, ss 50 and 4(1)(k), providing respectively that: "[a] defendant who is charged with a category 3 offence, and who pleads not guilty to that offence, may elect to be tried by a jury"; and "in general terms, a category 3 offence is an offence punishable by a term of imprisonment of 2 years or more (other than a category 4 offence)".

5 Discussion document at 6.

6 New Zealand Bill of Rights Act 1990, s 25(a).

9. The Law Society identified this threshold as including offences at the lower end of the spectrum of seriousness where jury trials are most commonly elected, such as repeat drink driving, common assault, male assaults female, and breach of a protection order. There is, further, presently an alignment between the two-year jury trial threshold and the custody threshold. Below two years, community-based sentences can be imposed, making it a logical signifier of a shift in perceptions of seriousness beyond that point.

2 Raising the jury trial threshold

A. The importance of jury trials

10. The Law Society agrees with the important functions fulfilled by juries, identified by the Law Commission in 1998 and summarised in the discussion document.[7] More broadly, two rationales underpin the significance of the jury trial:[8]

(a) The jury serves as a safeguard, or a bulwark of liberties.

(b) Juries facilitate public engagement with the criminal justice system, thereby increasing public awareness of and confidence in the justice system, as well as the robustness of that system.

The jury as a bulwark of liberties

11. Jury trials have an important role in safeguarding against wrongful exercises of power and protecting defendants.[9] For centuries, at least since *Bushell's Case* in 1670, the right to a jury trial has been seen as the ultimate protection for the public against unjust laws or unjust applications of the law in particular cases.[10] The jury system provides a powerful check on judicial and prosecutorial (in other words, state) power, and another layer of protection for defendants to ensure that trials will be fair and just:[11]

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge.

12. Enabling members of the public to decide facts and reach verdicts ensures that justice is democratised and not the sole domain of lawyers. Juries can "provide useful insights regarding contested facts and inject community values of equity and fairness into their decisions".[12] Community representation brings diverse perspectives into the courtroom that reflect the values and standards of the community in a way that judge-alone trials cannot. This helps maintain public confidence in the legal system.

13. For these reasons, jury trials are seen as an integral part of the justice system, key to ensuring justice is met.[13] The important functions fulfilled by juries within the criminal justice system help to maintain public confidence. While there are critiques about how to best manage the jury system and its process, the institution as a whole has strong

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7 At 6–7 and 9–10.

8 For a useful summary citing Canadian case authorities of these rationales, and the ways in which both individual and societal interests are served by jury trials, see further: Department of Justice Canada "Section 11(f) — Trial by jury" (13 August 2024) Charterpedia <www.justice.gc.ca/eng>.

9 See, generally, Anthony Gray "A guaranteed right to trial by jury at state level?" (2009) 15(1) Australian Journal of Human Rights 97 (**Gray, 2009**) at 99–103.

10 *Bushell's Case* (1670) 124 ER 1006.

11 *Duncan v Louisiana* 391 US 145 (1968).

12 Neil Vidmar "A Historical and Comparative Perspective on the Common Law Jury" in Neil Vidmar (ed) *World Jury Systems* (Oxford University Press, Oxford, 2000) 1 (**Vidmar, 2000**) at 19.

13 Gray, 2009 at 100.

support.[14] There is, the Law Society believes, a strong public sense that persons charged with serious offending should have the option to choose jury trial rather than judge alone trial if they so wish.[15] One reason often given for this is that jurors have a diversity of life experience which judges (many of whom come from relatively privileged backgrounds) may not have. Jurors are perhaps more likely than judges to be drawn from a widely representative range of socio-economic and cultural backgrounds. Determining guilt for a criminal offence often requires decisions as to what a defendant must have thought at a critical time, or how reasonable their conduct was in the circumstances — for example, when considering issues of consent or self-defence.[16]

Public engagement with the criminal justice system

14. Jury trials are also important in a wider constitutional sense. They allow members of the public to be involved at the core of the justice system.[17] The importance that jury trials have for informing the public and strengthening the justice system is widely recognised. This engagement enhances legitimacy and public confidence in the justice system.

15. Being on a jury is shown to give people greater understanding, "appreciation" and "respect" of the justice system, through making it more transparent.[18] The opportunity to serve on a jury provides an important educative function: members of juries can see how the process works. Of more general importance, including members of the public in the justice system through juries enhances public confidence.[19] People who have served on juries tend to have more support for the justice system.[20]

The right to choose trial by jury should not be eroded for efficiency reasons

16. It follows from the importance identified of the functions involved in the right to a jury trial — for the credibility and integrity of the justice system as well as to defendants — that this is an institution which should not be eroded lightly. Parliament should be slow to limit the right to jury trial any more than is necessary and appropriate. Efficient disposition of cases is not more important than their just outcome, and processes that serve the larger interests of both justice and public confidence.

B. Concerns about inadequate information and unsupported claims

17. The discussion document identifies jury trials, "which take longer to resolve and are increasingly being chosen by defendants as ways to determine their case", among significant causes of court delays.[21] It contends that:

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14 Vidmar, 2000 at 2–3.

15 Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in E McDonald and Y Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (VUW Press, Wellington 2011) 221–278.

16 The recent cases in England in relation to environmental protests provide one illustration of how this is still important in practice. While, in New Zealand, most of the offences likely to be charged in relation to protest activity will fall below the current threshold of 2 years, this is more a matter of charging practice than strict law - for example there are very disparate penalties for wilful damage under the Summary Offences Act (3 months max) and the Crimes Act 1961 (7 years for the least serious form) despite the offences being defined in effectively the same terms.

17 Katherine Corrick and Marc Rosenberg "Trial by Jury: The Canadian experience" (2015) 9(17) CEJA 6 at 15 (**Corrick and Rosenburg, 2015**).

18 Corrick and Rosenberg, 2015 at 13; Gray, 2009 at 110.

19 Vidmar, 2000 at 8; Gray, 2009 at 103.

20 Gray, 2009 at 110.

21 Discussion document at 1.

(a) more time and resources are needed for jury trials; and

(b) jury trials are contributing to delays.

18. The Law Society has concerns regarding these claims, specifically:

(a) assertions that are unsupported;

(b) more information and analysis could assist in a number of areas; and

(c) assumptions and analysis about the cost of jury trials.

Unsupported claims

19. The interim regulatory impact statement (**RIS**) provided to supplement the discussion document notes some important constraints on the information that is available and its modelling and predictions.[22] There is, consequently, some hesitance about its conclusions. This is concerning, given the fundamental nature of the issues being discussed. Understanding the data is crucial to the reform that is being proposed. When limiting fundamental rights with a view to system advantage, there is a need for a cause-and-effect policy rationale that addresses an understood policy problem. Changes should be informed by a quantifiable (rather than anecdotal or qualitative) evidence base and should not be based on supposition or suspicion.

20. The Law Society considers that a number of the suggestions given for why jury trials may require more resources and time than do judge alone trials are not necessarily correct. Of the five examples given in the discussion document, the following three raise questions:[23]

(a) *Trial callover hearings.* The concern identified in the discussion document is overstated, in the Law Society's view. Almost exactly the same issues need to be dealt with at case review hearing in preparation for a judge-alone trial (a judge-alone trial will, presumably, necessitate similar prior planning for vulnerable witnesses and AVL links, for example).

(b) *Pre-trial applications.* The discussion document notes that these will occur in judge-alone trials but indicates they are more numerous and complex in jury trials. Hard data would be useful. For example, it is possible they are more common in jury trials because jury trials more frequently involve multiple defendants and/or more complex sets of alleged offending. If so, the same question arises regarding the likelihood of significantly more efficient preparation if the cases were to be differently heard.

(c) *Jurors.* The involvement of jurors increases the cost and length of a trial. While it is true jury empanelling can take some hours, the document then goes on to suggest that jury deliberations may take many hours or even days. The alternative, however, is that the judge in a judge-alone trial must write a fully reasoned judgment, which will take longer to complete than most jury retirements — and without the benefit that judges usually are able to work on other judgments or on case preparation while the jury is deliberating.

Need for more information

21. There are also concerns about insufficient analysis and gaps in the information available. The increase in time taken to dispose of jury trial cases and significant increase, also, in

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22 Interim Regulatory Impact Statement: jury trial timeliness (**RIS**) (Ministry of Justice, 31 July 2024) at 4.

23 Discussion document at 7–8; RIS at 10.

the number of active jury trial cases is clear.[24] However, the causes remain unclear and are not examined.

22. In consequence, in the absence of fuller information, the Law Society is concerned that decision-makers are not equipped with the necessary information to assess the true necessity and likely efficacy of changes to the threshold. There are multiple cross-cutting factors in systemic delays and a need to be clear about how weighty the jury trial threshold is among those factors. In the Law Society's view, more information or analysis is particularly needed to understand:

    (a) *The cause of the increase in jury trial elections.* The discussion document has limited discussion of why more defendants are electing jury trial, and it is unclear what research (other than a reference to "anecdotal" accounts) the Ministry may have done to find out why this should be occurring, to inform policy decisions. Is it an across the board increase over a wide range of offences, or is it more targeted? Are they temporary causes? What mix of incentives and causes may be giving rise to this issue? Teasing out these factors could help to test the truth of assumptions underlying modelling in the RIS which "indicates that without legislative change, the numbers of jury trials, and time taken to dispose of them, will only increase".[25]

    (b) *Taking adequate account of other causes of delays in resolving trials.* For example, industrial actions and COVID-19 delays due to juror illness have had a huge impact on efficiency and have contributed to increases in time and delay. Given the substantial increase in the number of active jury trial cases since 2018, it would be pertinent to ask how much of that increase was due to postponement of trials during the COVID-19 pandemic and to consequent "churn" in the processing of cases. The erosion of the right to jury trial is not justifiable without taking the full context of other contributing factors into account.

Assumptions about costs

23. Jury trials can involve additional or different costs. On occasion, a jury trial may take longer in the courtroom stage because of the juror element; there is simply more to be explained at each part of the trial process, including empanelling processes (as earlier noted), the need for judges to sum up the evidence after it has been heard,[26] and to provide, at times, highly detailed directions to the jury about difficult points of law.[27]

24. However, on balance, the claim that jury trials necessarily consume significantly greater resources (other than the jury itself) than a judge-alone trial is unconvincing.[28] It is a basic point that removing matters from a jury procedural pathway does not result in the automatic disposal of those matters. They will still need a judge to hear and decide the case. In the Law Society's view, the time saving achieved is minimal and likely illusory, especially once the need to give reasoned judgment is factored in. For example, the time incurred in any jury trial needs to be balanced against the lack of judgment writing required and the variously protracted time it takes to receive judgment in each case tried by a judge alone. Many judges, even in the District Court, will not be practised in delivering

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24 RIS at 6.
25 RIS at 15.
26 Corrick and Rosenberg, 2015 at 15
27 Corrick and Rosenberg, 2015 at 15
28 By way of extreme example, in 2017 New Zealand's longest running judge alone trial, *MPI v Hawkes Bay Seafoods & Ors*, ran for about 8 months, concluding by way of pleas before close of the prosecution's case. The offences were fineable only. There were multiple pre-trial and in-trial judgments prior to pleas. The trial occupied significant resource on all sides.

an oral judgment. The more reserved judgments, the more writing time required, the less time judges are available to be in court dealing with the balance of the caseload. There may be more scope for conviction appeals to be litigated on the basis of a written reasoned judgment. A shift towards judge-alone trials also has implications for the High Court, which is likewise under increasing pressure. There is a risk that reducing the availability of jury trials may increase the High Court's workload, in the form of appeals from judge-alone District Court trials.[29] It will be important to factor in this cost if reform proceeds.

25. In short, the likelihood must be acknowledged and factored in of both fiscal costs and reasons for delay simply shifting from one part of the system to another. While the RIS identifies some of the fiscal consequences, it does so incompletely.[30] There are certainly flow-on costs and trade-offs additional to those noted in the RIS.[31]

C. Further matters (preferred threshold and Bill of Rights redrafting)

26. The Law Society does not, therefore, support the proposal to amend the jury trial election threshold at this time. In saying this, we acknowledge that other authorities considering the issue from time to time have taken a different view. They include:

    (a) A 2004 recommendation by the Law Commission that the threshold for an accused's right to elect a jury trial should be limited to offences regarded as 'serious' by today's standards and, therefore, a threshold of five years or more imprisonment could be appropriate.[32]

    (b) The section 7 report to the House of Representatives from the Attorney-General in 2010. This considered that although an increase to the threshold to three years or more imprisonment, as was proposed at the time, was necessarily inconsistent with the Bill of Rights, it still maintained the right to a fair trial when balanced against the delays the system was experiencing and impacts on access to timely justice.[33]

    (c) As the RIS points out, it is difficult to directly compare New Zealand's jury trial system with those of other countries, to understand how different proposed thresholds may compare.[34] However, while no clear answer emerges from considering other jurisdictions, they range from a constitutional right to a jury trial in the United States where the maximum term of imprisonment exceeds six months, to, in Canada, a threshold of five years.

27. We accordingly consider below:

    (a) what, if changed, the most appropriate of the three threshold options would be; and

    (b) the more general question of rewording the provision for the right to jury trial in the Bill of Rights.

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29 Jury trials in the District Court would usually go to the Court of Appeal; appeals from judge alone trials are typically to the High Court.

30 RIS at 7 – 8.

31 RIS at 2.

32 New Zealand Law Commission *Delivering Justice for All* (NZLC R85, 2004).

33 Report of the Attorney General, under the New Zealand Bill of Rights Act 1990 on proposed amendment to s 24(e) of the New Zealand Bill of Rights Act 1990 in the Criminal Procedure (Reform and Modernisation) Bill, presented to the House of Representatives pursuant to section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 261 of the Standing Orders of the House of Representatives.

34 RIS at 3.

The preferred threshold (if changed)

28. If there is to be any increase in the jury trial threshold, the Law Society considers that it should be kept to the lowest option available. The fundamentality of the right to trial by jury is such that it should not be lightly interfered with — and if interfered with, adjusted no more than is needed.

29. Option B (a five-year threshold) has the advantage of having been recommended by the Law Commission, albeit now two decades ago and prior to other criminal justice reforms taking place (ie, the Criminal Procedure Act 2011 and Evidence Act 2006). A seven-year threshold (option C), as noted in the RIS, would be a very significant change. It follows from doubts about whether there is sufficient justification for any change at all that equal or larger doubts exist regarding the justification for what the RIS correctly identifies as a significant change.

30. On balance, this leads us to the view that of the three proposed possible thresholds, option A is the most preferable. It is sensible that, if there is to be a change at all, a less substantial, more incremental, change is preferred, so that its effect may be monitored and further tweaked if the anticipated system advantages do not materialise.

31. There is a further potential argument favouring this option. A change in threshold to three years may assist in addressing some concerns we have heard from practitioners about regulatory, fineable only, offences being qualifiable. Often, these offences are strict liability and involve complex and/or technical evidence which can increase the length (and cost) of a jury trial.

32. Resource Management Act (RMA) offences are one example of such offences. We note that the Natural and Built Environment Act 2023, if implemented, would have made RMA offences no longer electable.[35] Practitioners we have heard from consider this would have been a desirable outcome. We have heard that some would favour the change proceeding for this limited category of offences regardless of whether the threshold is generally amended.

Reviewing the provision of a specific threshold in the Bill of Rights Act

33. The discussion document seeks views on whether the Bill of Rights should continue to specify the sentencing threshold at which the right to elect a jury trial is guaranteed. There may be other ways of wording the right, such as by referring more simply (but vaguely) to trials for a 'serious offence'.

34. In suggesting this, the discussion document alludes to the potential for further future changes to the threshold, noting that a Bill of Rights change of this kind could assist in the future if further threshold shifts are needed. It also notes that "[i]n providing a specific threshold at which a jury trial is available, section 24(e) is expressed differently from most other rights in NZBORA, which tend to be expressed in more general terms."[36]

35. The question is considered below in two parts:

    (a) If the threshold is to be changed (necessitating a Bill of Rights amendment), would it be more pragmatic and could it be acceptable to make the wording more general? What problems could arise?

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35 Natural and Built Environment Act 2023, s 636 and sch 13 (repealed).

36 At 14.

(b) The possibility of wording the right more generally raises a broader prospect of mirroring this in procedural provisions, to allow for more flexibility in general in the allocation of jury trials (in the form of case-by-case consideration of the seriousness and public interest in each case). However, on balance, doing so is likely outweighed by the difficulties and disadvantages.

36. Reframing the Bill of Rights provision in the open-ended (or subjective) way potentially suggested would remove the presumption of a guaranteed specific minimum standard in favour of referring simply to offending that is serious. This is indeed signalled as a reason potentially to make the change: to make legislative life easier in the future, should the threshold continue to need to be changed. Doing so does not rule out the option of continuing to specify the statutory threshold in the Criminal Procedure Act 2011, and (for the reasons that follow) it is difficult to see how it would otherwise be workable. However: the Law Society's first concern is with the underlying implication that this minimum standard of criminal procedure will continue to be eroded. The signal in the discussion paper about hedging against ongoing future threshold increases is concerning: in other words, anticipating, and making easier, the continuing erosion of this longstanding and basic right, and undermining the norm of jury involvement.

37. Potentially, a change of this kind could have broader justifications and possibilities, and we have considered these. There is a degree of arbitrariness in tying procedural requirements and procedural guarantees (and in this case, a protected right) to statutory maxima. There are recognised problems with the consistency and coherence of statutory maxima, due to the way they have evolved over time.[37] Changing this aspect of the Bill of Rights is one way of responding to this.

38. Another possibility is that rephrasing the Bill of Rights provision, for example, to say: "shall have the right, … to the benefit of a trial by jury where the offence alleged is of a serious nature" and/or "… where the allegation involves matters of public interest" could have benefits because it could enable a degree of flexibility to develop in the system. Depending on how the right was reworded, the result could be that "less serious" matters that are of high public interest could receive the benefit of a jury trial. Conversely, it would also mean that when serious charges are laid involving relatively minor factual situations, these could be weeded out so as not to overburden the system. Such an approach could allow, in other words, for flexibility in the application of community standards of seriousness. However, to operationalise such a change would involve a very significant shift in both philosophy and approach. Taken to its fullest extent, it would remove a protected right and minimum standard, in favour of a requirement for an application to be made by defendants (thus inverting the present right to a matter of discretion and privilege). It would involve case-by-case assessments of relative offence seriousness. There is potential for inconsistency in application (due for example to the potential for differing judicial views on relative offence seriousness and morality, raising in turn

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37 New Zealand Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006; RIS at 10–11. While acknowledging the unlikelihood that it will occur (and the time and complexity of the task involved), the Law Society considers that a wholesale reset of statutory maxima, considering updated societal views on relative offence seriousness could be beneficial; and, indeed, more preferable as a solution to the present concerns than adjustment of the jury trial threshold.

concerns of regional differences in application). Relatedly, there is potential for differing treatment on already recognised grounds, such as ethnicity (unconscious bias).[38]

39. On balance, the Law Society considers that given the potentially major implications of rewording section 24(e), it may be preferable as the discussion document suggests to wait for wider Bill of Rights review. As a minimum (if it is to be pursued) there will need to continue to be in the Criminal Procedure Act a specified minimum threshold.

3 Time of election

40. The second main proposal in the discussion document is a substantially smaller, more technical change that would enable more flexibility in when, during a criminal proceeding, a defendant can choose to elect a trial by jury.

41. Specifically, the change proposed would allow a defendant to make the decision to elect at any point up to, and including, the case review hearing (**CRH**). For the following reasons, the Law Society supports this change.

42. Allowing trial election at the time of a CRH is sensible, in the Law Society's view. A large proportion of cases are resolved prior to or at CRH and, therefore, this could decrease the number of matters in which an election is made. It also has the advantage that by that point in proceedings defendants should have all the prosecution evidence and have had a proper opportunity to receive advice, and so be able to make a better informed decision. Postponing election to CRH may lead to more meaningful case management memorandum discussions. At present (anecdotally), cases where jury trial has been elected can result in a perfunctory CRH, with the matter simply remanded off to a first trial callover. While a brief survey of the profession (facilitated by the Law Society and separately provided to Justice officials) suggested some varying views, a later jury trial election was supported by many respondents, a number sharing the view that fewer jury trial elections could result from such a change. We agree with the analysis in the RIS about the numbers of jury trial elections potentially arising from a desire by defendants (and advice from their counsel) to 'preserve their options': it being a prudent approach early in the process where counsel has insufficient information or instructions.[39] This is borne out by the results of the survey. Accordingly, delaying the point of election may assist in reducing this issue.

4 Need for other solutions

43. Lastly: the RIS explicitly states that it "does not analyse operational options for improving the timeliness of jury trials, or for improving court timeliness more generally", as these options are being considered separately.[40] It notes, too, that the Ministry does not yet have — but is building — the capability to comprehensively model the impacts arising from the full range of initiatives in the District Court Timeliness Programme, including how different initiatives may interact with each other.[41]

44. This is welcome — more than that, the Law Society considers it essential. But it is concerning that, meantime, it leaves officials "not currently able to confidently predict how

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38 The advisability of making jury trials subject to some case-by-case judgment of relative offence seriousness is indirectly considered in the RIS considering the different issue of "sentence-capped charges" (involving prosecutorial discretion). On this point, the Law Society agrees with the RIS conclusions.

39 RIS at 9.

40 RIS at 14.

41 RIS at 4.

other initiatives will impact and be impacted by" the issues and options being explored in the present discussion document.[42]

45. In conclusion, therefore, we reiterate the Law Society's view that the backlog in the criminal justice system may well be able to be dealt with in more effective ways than eroding fair trial rights. Priority should be given to other ways of addressing inefficiency, ahead of further limiting the right to elect a jury trial. For example, these may include:

    (a) *Case management issues.* Clearly, there are issues with the judge-alone trial pathway, not confined to jury trials. For instance, the RIS notes that 76 per cent of judge-alone trials resolve by withdrawal, dismissal or plea on the day of the trial without any actual need for a trial.[43] The RIS further notes the possibility for improved efficiencies from the caseflow management initiative Te Au Reka: a digital system.[44]

    (b) *Judicial appointment and training.* More District Court judges with jury trial warrants, and more courtrooms, would allow trials to proceed more quickly. While available courtrooms will be a constraint, it seems short-sighted not to consider increasing the judicial cap.[45] This is a long-term issue in the effective delivery of timely justice.

    (c) *Prosecutorial issues.* For instance, some of the much larger number of court appearances for jury trials are likely the result of more rigorous lawyering seeking disclosure that had not been provided and raising pre-trial arguments than innate inefficiencies in the jury trial process.

46. These have been longstanding systemic issues. Addressing them may well involve more investment in the system. Sufficient investment is vital to ensure that fair trial rights remain paramount, be it by way of jury trial or judge alone.

47. Consideration of other system interventions such as these would be relevant before determining that a jury trial threshold change is warranted. In the Law Society's view, the discussion document approaches the issue from the wrong end. The proposed intervention would affect a fundamental right and pillar of our justice system and should be the last thing to reach for, once other causes and alternative approaches have been far more fully explored. To do so in the absence of that analysis is premature.

Naku noa nā,

David Campbell
Vice President

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42 RIS at 4.
43 RIS at 8; and New Zealand Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005).
44 RIS at 7.
45 RIS at 15.